

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 03-04030-01-CR-C-SOW
)	
JACK WAYNE ROGERS,)	
)	
Defendant.)	

MOTION FOR UPWARD DEPARTURE

COMES NOW the United States of America, by Todd P. Graves, the United States Attorney for the Western District of Missouri, and respectfully moves this Court pursuant to 2G2.4, 4A1.3, 5K2.2, and 5K2.8 of the United States Sentencing Guidelines (U.S.S.G.), to depart upward and sentence Defendant above the sentencing guideline range of 57 to 71 months. In support, the United States offers the following suggestions.

SUGGESTIONS

I. Background

Defendant pleaded guilty in the instant case to all eleven charges in the Superseding Indictment (possession of child pornography, Counts One and Two; distribution of child pornography, Counts Three through Seven; and distribution of obscene materials,

Counts Eight through Ten; and forfeiture, Count Eleven).¹ The Defendant has been assessed as a Criminal History Category II, with a sentencing guideline level of 24, for a sentencing range of 57 to 71 months. In paragraph 15 of the Plea Agreement, the Defendant acknowledged that the United States may seek an upward departure from the Sentencing Guidelines. The United States respectfully suggests that Defendant should be sentenced above 71 months because he possessed hundreds of images of child pornography; his criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct and the likelihood that defendant will commit other crimes; his conduct was extreme; and the extreme physical injury that resulted from his conduct.

II. Points and Authorities

A. Evidence Allowed at Sentencings - in General

1. Title 18, United States Code, Section 3661 provides: "No limitation shall be placed on the information concerning the background, character, and conduct a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

2. Supporting and expanding upon the above statute, U.S.S.G.

¹Defendant also faces charges in the Circuit Court of Boone County, Missouri for first degree assault and the unauthorized practice of medicine in Case No. 03CR179884. Count One charges that the Defendant cut off the penis, scrotum and testicles of Michael Ambercombie. Count Two charges the same conduct as the unauthorized practice of medicine.

Section 1B1.4 provides: "In determining the sentence to impose within the guideline range, or *whether a departure from the guidelines is warranted*, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." (Emphasis added.)

3. A specific rule of evidence, Fed. R. Evid. 1101(d)(3), provides that the rules of evidence do not apply at sentencing. "A sentencing judge has broad discretion as to the type of information he may consider, as well as its source. Uncorroborated hearsay and unprosecuted criminal activity are both proper topics for the court's consideration, as long as the defendant is afforded an opportunity to explain or rebut the evidence." United States v. York, 830 F.2d 885, 893 (8th Cir. 1987).

Since the fullest information possible concerning the defendant's life and characteristics is essential to a judge's selection of an appropriate sentence, sentencing judges have "'not [been] restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics.'" Williams v. Oklahoma, 358 U.S. 576, 584, 79 S.

Ct. 421, 426, 3 L.Ed.2d 516 (1959).” United States v. Wise, 976 F.2d 393, 398 (8th Cir. 1992).

4. Finally, Title 18, United States Code, Section 3553(a)(2) provides:

“[T]he Sentencing Reform Act places rehabilitation of the defendant as the last of four goals to be accomplished through a sentence, the first three of which are punishment, deterrence, and incapacitation. Title 18, United States Code, Section 3553(a)(2).” United States v. Wise, 976 F.2d 393, 398 (8th Cir. 1992).

B. Departures – in General

A succinct summary of the analysis to be used to determine the propriety of a departure is provided in United States v. Woods, 159 F.3d 1132, 1134 (8th Cir. 1998):

Under Koon v. United States, 518 U.S. 81, 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996), a district court may depart from the Sentencing Guidelines if ‘the court find that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.’ Id. at 92, 116 S. Ct. 2035 (quoting Title 18, United States Code, Section 3553(b)). The Supreme Court noted that the Sentencing Commission ‘did not adequately take into account cases that are, for one reason or another, ‘unusual,’ ‘518 U.S. at 93, 116 S. Ct. 2035 (citing 1995 U.S.S.G. ch.1, pt. A, intro. comment. 4(b)), and said that, under the Guidelines, departures may be considered in ‘atypical’ cases.

Before departing from the Guidelines, a

sentencing court first must determine whether a particular case presents features that 'take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case.' Koon, 518 U.S. at 95, 116 S. Ct. 2035. The court must then decide whether the Sentencing Commission has forbidden, encouraged or discouraged departures based on those features. While a forbidden factor may not be used as a basis for departure, an encouraged factor may be considered if the Guidelines have not already taken it into account. A discouraged factor - or an encouraged factor already taken into account - may also be used as a basis for departure if the factor is present to an exceptional degree. If the factor is unmentioned, the sentencing court must consider the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' and decide whether the factor is sufficient to take the case out of the heartland. Id. at 96, 116 S. Ct. 2035. . . . The Commission specifically said that it did 'not intend to limit the kind of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.' U.S.S.G. ch.1, pt. A, intro. comment. 4(b).

C. Upward Departures

1. In General²

The guidelines embody the notion that the severity of a sentence should be determined both by the seriousness of the offense (reflected by the base offense level inquiry under chapter two) and by 'the offender and the need to deter him from further criminal activity' (as assessed by the criminal history score calculated under chapter four.) United States v. Saffels, 39 F.3d 833, 836 (8th Cir. 1994).

² Again, the defendant was given notice of the government's intent to seek an upward departure in paragraph 15 of the Plea Agreement in this case.

United States v. Thornberg, 326 F.3d 1023, 1027 (8th Cir. 2003).

The Government does not have to set forth the Defendant's offense conduct in this case as it is set forth in the Plea Agreement entered into in this case and in the Presentence Investigation Report submitted to the court.

In this case, Counts One and Two (possession of child pornography) carry a statutory range of imprisonment of not less than two years, and not more than ten years. Counts Three through Seven (distribution of child pornography) carry an imprisonment range of not less than five years and not more than thirty years. These ranges are the result of Defendant's prior federal conviction for possession of child pornography in case number 92-04006-01-CR-C-5. Counts Eight through Ten carry a statutory maximum term of imprisonment of not more than five (5) years.

III. Grounds for Upward Departure

A. Number of Images of Child Pornography

Section 2G2.4 of the 2002 Sentencing Guidelines provides:

"If the offense involved a large number of visual depictions, an upward departure may be warranted, regardless of whether subsection (b)(2) applies.

In this case, the Presentence Investigative Report states that a conservative estimate is that the Defendant possessed approximately 860 images of child pornography. Law enforcement officials are prepared to show the Court that at this residence in

Fulton alone, the Defendant possessed approximately two thousand (2000) images of child pornography. This does not include those images found at Defendant's business address in Columbia, Boone County, Missouri. Had the Protect Act been in effect at the time of these offenses, the Defendant would have been subject to a five level increase for possessing in excess of six hundred (600) images, and thus his sentencing range would have been 97-121 months. Thus, this is a sufficient basis for the Court to upward depart to the statutory minimum of 120 months on Counts One and Two.

In addition, the Court may use a specific offense characteristic of other guidelines as a basis of departure from the applicable guideline at sentencing. The "Grounds for Departure" policy statement of Section 5K2.0 provides that:

[A] factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the uses of a weapon has been listed as a specific offense characteristic under many guidelines, but not under the other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for that reason.

As a result, the Court may use this factor (more than 600 images) to depart upward on Counts Three through Seven as well.

B. Extreme Nature of the Conduct

Section 5K2.8 of the Sentencing Guidelines provides for an upward departure in cases involving extreme conduct. Section 5K2.8 provides that:

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

The facts of this case regarding Counts Eight through Ten show that the Defendant performed "nullification," that is the removal of other males' scrotum, penis, and testicles. The Defendant is not a licensed health care provider. In the instant case, the Defendant removed the scrotum, penis, and testicles of Michael Ambercrombie in Columbia, Missouri, on or about October 21, 2002. The Defendant took photographs of the procedure, including photographs of the removed testicles, scrotum, and penis on a dinner plate, and on the defendant's head, as well as of the Defendant ingesting the removed body parts. The Defendant's "nullification" activities were also featured on a website located by law enforcement.

As the Defendant admitted at his plea of guilty, he sent photographs of the testicles and penis to other individuals via the Internet. The Government submits that clearly this conduct is heinous, cruel, brutal, or degrading to the victim. Further, the

evidence shows that the Defendant performed these nullifications on other occasions. Finally, the court also needs to be aware of the computer chats of the Defendant in which he details the abduction and mutilation of a young man. While these statements have not resulted in any criminal charges, these statements, even if accepted as "fantasy," are very troubling considering the Defendant's past criminal conduct.

C. Physical Injury

Section 5K2.2 provides that:

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in § 5K2.1.

In this case, Michael Ambercrombie voluntarily submitted to the nullification procedure by the Defendant. However, not surprisingly, there were serious complications because of the Defendant's surgery, and Mr. Ambercrombie had to seek medical treatment and major surgeries at another location for what the United States understands to have been a life threatening medical condition.

D. Inadequacy of Criminal History Category

The Court should also depart upward because Defendant's criminal history category does not adequately reflect Defendant's past criminal conduct nor the likelihood that Defendant will commit other crimes. Sentencing Guidelines Section 4A1.3 provides:

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning: (a) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);... (e) prior similar adult criminal conduct not resulting in a criminal conviction.

The Court may consider the similarity of past offenses to the instant offense and in so doing may conclude that previous leniency was not effective or that there is a heightened need for deterrence. United States v. Goings, 200 F.3d 539, 542 (8th Cir. 2000).

The Defendant has not disputed that he plead guilty to a felony receipt of child pornography in 1992 in case number 92-04006-01-CR-C-5. The Defendant was sentenced to a period of incarceration of four (4) months, and three (3) years of Supervised Release.

In that case, the Defendant ordered and received a photoset

and magazine containing child pornography, specifically a minor male. A search warrant at his Fulton residence also resulted in officers seizing photographs of the Defendant engaged in deviant sexual behavior with a young adult male, age undetermined. Materials and photos on bondage and self-mutilation were also found. This Court was lenient in sentencing the Defendant.

This past conduct, along with the instant offense, shows that there is a strong likelihood that if released, the Defendant is very likely to commit these crimes. Thus, the United States asks the Court to depart upward for this reason as well.

For all of the above reasons, the United States believes that the Court should depart upward on Counts One and Two to the statutory minimum of 120 months; and on Counts Three through Seven to the statutory maximum of 360 months.

Respectfully submitted,

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by /s/

Lawrence E. Miller
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